

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

5 ARMOND LEWIS,)
6 Plaintiff,) 3:12-cv-00424-MMD-VPC
7 v.)
8)
9 R. STALNAKER, et al.,) **REPORT AND RECOMMENDATION**
10 Defendants.) **OF U.S. MAGISTRATE JUDGE**

)

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendant's motion for summary judgment (#23).¹ Plaintiff opposed (#30) and defendant replied (#32). The court has thoroughly reviewed the record and recommends that defendant's motion for summary judgment (#23) be denied.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Armond Lewis (“plaintiff”) is currently incarcerated at Lovelock Correctional Center in the custody of the Nevada Department of Corrections (“NDOC”) (*see* #31). Plaintiff brings his *pro se* amended civil rights complaint pursuant to 42 U.S.C. § 1983, alleging that several Nevada State Prison (“NSP”) corrections officers violated his Eighth and Fourteenth Amendment rights (#4). The court screened the complaint pursuant to 28 U.S.C. § 1915A, and permitted the following claim to proceed: count I: defendant officer Tabitha Creon (“defendant”) used excessive force against plaintiff in violation of his Eighth Amendment rights (#3, p. 5).

¹ Refers to the court's docket numbers.

1 Plaintiff alleges the following: on May 13, 2011, several NSP officers were escorting him to
 2 administrative segregation (#4, p. 6). At some point, officers took plaintiff down to the ground, an
 3 apparent struggle ensued, and plaintiff was beaten by several officers. *Id.* Plaintiff was placed in
 4 four-point restraints, and officers carried him to the infirmary. *Id.* When they passed through the
 5 cell-house yard tunnel, defendant “exited the property room and physically kicked [plaintiff] in
 6 (balls) the groin region” when he was fully restrained. *Id.*

8 Defendant asks the court to grant summary judgment in her favor, arguing that no genuine
 9 issue of material fact exists and that she is thus entitled to judgment as a matter of law (#23, pp. 1-
 10 2).

12 II. DISCUSSION & ANALYSIS

13 As a preliminary matter, the court notes that plaintiff is proceeding *pro se*. “In civil cases
 14 where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford
 15 plaintiff the benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623
 16 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

18 A. Legal Standards

19 1. 42 U.S.C. § 1983

20 Title 42 U.S.C. § 1983 “provides a federal cause of action against any person who, acting
 21 under color of state law, deprives another of his federal rights.” *Conn v. Gabbert*, 526 U.S. 286, 290
 22 (1999). Section 1983 does not offer any substantive rights, but provides procedural protections for
 23 federal rights granted elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). To prove liability
 24 under § 1983, a plaintiff must: (1) show that a person acting under color of state law engaged in
 25 some type of conduct, which (2) deprived the plaintiff of some right, privilege or immunity secured
 26

1 by the Constitution or federal statutory law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overturned*
 2 *on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

3 **2. Summary Judgment**

4 Summary judgment allows courts to avoid unnecessary trials where there are no factual
 5 disputes. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The
 6 court will grant summary judgment if no genuine issues of material fact remain in dispute and the
 7 moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court must view all
 8 evidence and any inferences arising from the evidence in the light most favorable to the nonmoving
 9 party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). However, the Supreme Court has
 10 noted:

11 [W]e must distinguish between evidence of disputed facts and disputed matters of
 12 professional judgment. In respect to the latter, our inferences must accord deference
 13 to the views of prison authorities. Unless a prisoner can point to sufficient evidence
 14 regarding such issues of judgment to allow him to prevail on the merits, he cannot
 15 prevail at the summary judgment stage.

16 *Beard v. Banks*, 548 U.S. 521, 530 (2006) (internal citations omitted). Where reasonable minds
 17 could differ on the material facts at issue, however, summary judgment should not be granted.
 18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

19 The moving party bears the burden of informing the court of the basis for its motion, and
 20 submitting authenticated evidence to demonstrate the absence of any genuine issue of material fact
 21 for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see Orr v. Bank of America*, 285 F.3d
 22 764, 773-74 (9th Cir. 2002). Once the moving party has met its burden, the party opposing the
 23 motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific
 24 facts showing the existence of a genuine issue for trial. *Anderson*, 477 U.S. at 248. Rule 56(c)
 25 mandates the entry of summary judgment, after adequate time for discovery, against a party who
 26
 27
 28

1 fails to make a showing sufficient to establish the existence of an element essential to that party's
 2 case, and upon which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.
 3

4 On summary judgment the court is not to weigh the evidence or determine the truth of the
 5 matters asserted, but must only determine whether there is a genuine issue of material fact that must
 6 be resolved by trial. *See Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).
 7 Nonetheless, in order for any factual dispute to be genuine, there must be enough doubt for a
 8 reasonable trier of fact to find for the plaintiff in order to defeat a defendant's summary judgment
 9 motion. *See Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

10 **B. Analysis**

11 Plaintiff alleges that defendant kicked him in the groin when he was fully restrained, in
 12 violation of his Eighth Amendment rights (#4, p. 6). The Eighth Amendment prohibits the
 13 imposition of cruel and unusual punishments and "embodies broad and idealistic concepts of dignity,
 14 civilized standards, humanity and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).
 15 "[W]henever prison officials stand accused of using excessive physical force in violation of the
 16 [Eighth Amendment], the core judicial inquiry is . . . whether force was applied in a good-faith effort
 17 to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v.*
 18 *McMillian*, 503 U.S. 1, 6-7 (1992); *see also Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Watts*
 19 *v. McKinney*, 394 F.3d 710, 711 (9th Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir.
 20 2003); *Marquez v. Gutierrez*, 322 F.3d 689, 691-92 (9th Cir. 2003); *Clement v. Gomez*, 298 F.3d
 21 898, 903 (9th Cir. 2002); *Jeffers v. Gomez*, 267 F.3d 895, 900 (9th Cir. 2001) (per curiam); *Schwenk*
 22 *v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000); *Robins v. Meecham*, 60 F.3d 1436, 1441 (9th Cir.
 23 1995); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986). When determining whether the force is
 24 excessive, the court should look to the "extent of injury . . . , the need for application of force, the
 25

1 relationship between that need and the amount of force used, the threat ‘reasonably perceived by the
2 responsible officials,’ and ‘any efforts made to temper the severity of a forceful response.’” *Hudson*,
3 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321); *see also Martinez*, 323 F.3d at 1184. Although the
4 Supreme Court has never required a showing that an emergency situation existed, “the absence of an
5 emergency may be probative of whether the force was indeed inflicted maliciously or sadistically.”
6 *Jordan*, 986 F.2d at 1528 n.7; *see also Jeffers*, 267 F.3d at 913 (deliberate indifference standard
7 applies where there is no “ongoing prison security measure”); *Johnson v. Lewis*, 217 F.3d 726, 734
8 (9th Cir. 2000). Moreover, there is no need for a showing of serious injury as a result of the force,
9 but the lack of such injury is relevant to the inquiry. *See Hudson*, 503 U.S. at 7-9; *Martinez*, 323
10 F.3d at 1184; *Schwenk*, 204 F.3d at 1196.

13 Defendant denies kicking plaintiff in the groin while he was fully restrained, or at any other
14 time (#23, p. 4). She contends the following: supervising officers decided to place plaintiff in
15 administrative segregation for making harassing comments to defendant. *Id.* at 6. Plaintiff yelled
16 obscenities at defendant when he was being escorted to administrative segregation, then pulled away
17 from the escort officers and lunged at another officer. Several officers—apparently not including
18 defendant—used force to subdue plaintiff, taking him to the ground twice. Two different officers
19 fired blanks from their gun posts. Plaintiff was ultimately carried to the infirmary and placed in
20 ankle restraints. Thereafter, the escort team began to video record the incident. Plaintiff indicated
21 that he felt that he had injured his left ankle and had internal bruising. The physical examination
22 also identified a minor abrasion on his right forearm and soreness in his right wrist. Plaintiff was
23 later transported to Northern Nevada Correctional Center for a mental health evaluation and
24

25
26
27
28

1 violently resisted being placed in the transport van (*id.* at 7-8; Ex. A, investigation detail reports,
 2 NDOC 0017-0028).²

3 Defendant further alleges that on June 6, 2011, plaintiff sent correspondence to the NDOC
 4 Inspector General alleging that defendant kneed him in the side, not the groin (#23, p. 9; Ex. A,
 5 NDOC 37). Plaintiff filed a grievance on August 7, 2011, stating that officers twisted his genitals
 6 during the incident (Ex. A, NDOC 0004-6). On June 28, 2012, plaintiff sent a letter to NDOC
 7 Offender Management that stated generally that defendant took part in assaulting him along with the
 8 other officers (#23, p. 9; Ex. B, NDOC 0046-47). On October 2, 2012, plaintiff was interviewed
 9 pursuant to the Inspector General's investigation of the incident (#23, Ex. B, NDOC 0043). In that
 10 interview, plaintiff claimed that defendant kicked him in the "stomach groin area" when he was
 11 being escorted to the NSP infirmary. *Id.* Plaintiff's main medical complaints resulting from the
 12 incident were arm, back and shoulder pain, and occasional difficulty passing bowel (#23, Ex.'s F,
 13 NDOC 0076-85; H, NDOC 0113; J, NDOC 0127, 130, 131, 134, 135, 143, 146, 147, 149, 150, 166,
 14 192, 199, 209, 217).³ Plaintiff twice complained of groin pain: on August 7, 2011, he claimed
 15 generally that his pain stemmed from officers punching and kicking all parts of his body including
 16 his groin region; on April 1, 2012, he claimed that his groin pain stemmed from officers twisting his
 17 testicles (#23, Ex. J, NDOC 0123, 0185). The medical record reflects that these complaints were
 18 isolated, and it does not appear that plaintiff received any follow-up treatment for any alleged injury
 19 (#23, Ex.'s F – J). Defendant thus argues that plaintiff's allegations are inconsistent with officer
 20 incident reports and his medical record and that his grievances and correspondence related to the
 21 incident are inconsistent, silent or generalized on this issue.

28 ² Authenticated by the declaration of NDOC Inspector General Pamela del Porto (#23-1, pp. 2-3).

³ Plaintiff's medical records were authenticated by the declaration of NDOC Health Information Coordinator Ronnalee Knight (#23-1, pp. 8-9).

1 In his opposition, plaintiff asserts that “. . . and after such brutalities [plaintiff] was kick [sic]
2 in the groin by [defendant] while he was held in the air by her fellow prison guards as [he] was being
3 carried off in restraints to the infirmery [sic]” (#30, p. 2). Plaintiff attached his sworn declaration, in
4 which he attests: “As I was being carried off by several male prison guards, one [corrections officer]
5 on each extremity, [the defendant] took it upon herself to gratuitously kick me in the testicals [sic]
6 on the way to the infirmary [sic] on May 13, 2011.” *Id.* at 13. Plaintiff points out that defendant
7 failed to provide her affidavit or the affidavit of any other witnesses refuting his claim.
8

9 The court concludes that plaintiff has demonstrated that a genuine dispute of material fact
10 exists that precludes granting summary judgment in favor of defendant. Defendant provides officers’
11 incident reports, medical records, and video recordings to support her claim that she did not kick
12 plaintiff in the groin while he was fully restrained. All parties agree that the videos recorded events
13 after the point in time when plaintiff alleges he was kicked; thus, they have no probative value. The
14 officer incident reports are generally consistent in their recitation of events, but of course, the fact
15 that the reports make no reference to defendant kicking plaintiff in the groin while he was fully
16 restrained does not disprove plaintiff’s claim. Finally, while the fact that plaintiff’s medical records
17 do not lend much, if any, support to his claim that defendant violated his Eighth Amendment rights
18 by kicking him while he was restrained, again they do not disprove his claim. Defendant does not
19 provide her own declaration or that of any witness; however, as plaintiff has provided his sworn
20 declaration, defendant’s declaration would not establish the lack of any dispute of material fact.
21 Accordingly, the court determines that defendant’s motion for summary judgment should be denied.
22
23
24
25
26
27
28

III. CONCLUSION

Based on the foregoing, and for good cause appearing, the court concludes that defendant has failed to demonstrate that there are no genuine issues of material fact for trial; thus, defendant's motion for summary judgment should be denied.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled “Objections to Magistrate Judge’s Report and Recommendation” and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendant's motion for summary judgment (#23) be **DENIED**.

DATED: April 3, 2014.

Valerie P. Cooke

UNITED STATES MAGISTRATE JUDGE